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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

DONALD L. WILKINS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on October 31, 1967 (No. 10844).

OPINIONS BELOW

There was no formal opinion of the United States District Court for the Eastern District of Virginia. The opinion of the Circuit Court of Appeals has not yet been reported, but it is reproduced in Appendix A to this petition.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 31, 1967. A timely petition for rehearing en banc filed November 30, 1967, was denied on December 8, 1967. The jurisdiction of this Court is invoked under the provisions of 28 U. S. Code § 1254 (1) and Rule 19(1) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

The instant petition presents the following questions for consideration:

> Whether substantial conflict requiring resolution exists among the decisions of Courts of Appeals concerning the validity of jury instructions, given in primary and supplemental instructions at Wilkins' trial, tending to shift the burden of proof to the defendant and establishing a fallacious criterion for the ascertainment of specific intent.
>
> Whether Wilkins' Sixth Amendment right to be tried by an impartial jury was offended and abridged by the receipt of voluminous improper prejudicial evidence and the trial court's seriously erroneous instructions thereon.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Internal Revenue Code § 7201, 26 U.S.C. § 7201 (1964)

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

A. Indictment, Sentence, and Appeal

The defendant, petitioner herein, Donald L. Wilkins, was indicted on December 8, 1965, in the United States District Court for the Eastern District of Virginia in four counts for attempting to evade and defeat income taxes in each of the years 1960-63 in violation of the provisions of 26 U.S.C. § 7201. He pleaded not guilty and thereafter moved for dismissal of Count One, asserting that said count was based upon his 1960 tax return, whereas the income involved was essentially received in and properly taxable to the years 1956, 1958, and 1959. Alternatively, he moved to sever the trial on Count One from the remaining three counts on the grounds that the transactions involved in Count One were different from those comprehended by Counts Two, Three, and Four (collectively) and that such transactions would prejudice the jury against him on the remaining three counts. The motion to dismiss Count One or, alternatively, for severance was denied.

Trial commenced before a jury on May 9, 1966. The jury returned a verdict of guilty on each of the four counts on May 13, 1966. Motions for judgment of acquittal at the conclusion of the Government's case and at the close of the case were denied. A motion for judgment of acquittal notwithstanding the verdict or for a new trial was likewise denied. On August 8, 1966, Wilkins was sentenced to confinement for eighteen months on each count with twelve months on each count to be suspended, the sentences to run concurrently.

The United States Court of Appeals for the Fourth Circuit, on October 31, 1967, set aside the defendant's conviction and sentence on Count One and ordered a new trial on that count.[1] The convictions and sentences on Counts Two, Three, and Four were affirmed. Wilkins filed a Petition for Rehearing En Banc on November 30, 1967, which was denied without opinion by the Court of Appeals on December 8, 1967.[2]

B. Trial Developments Relevant To This Petition

The detailed facts of the case, as contained in the opinion of the Fourth Circuit Court of Appeals (associated herewith as Appendix A), are not essentially disputed, and will be treated only as germane to the considerations raised by this petition.

Count One of the indictment alleged a willful attempt to evade the payment of income taxes for the year 1960. The Government's proof at trial, however, related largely to income found by the Court of Ap-

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[1] Appendix B(2), *infra*, p. 20a.

[2] Appendix B(3), *infra*, p. 21a.

peals to have been received by Wilkins from lot sales and a condemnation proceeding in the years 1956-1959 and hence "not taxable to him in the prosecution year, 1960". (App. A, 7-8).

Count One unquestionably embraced the dominant theme of the Government's case[3] and evidence on this point constituted the vast majority of the evidence at trial. There is appended hereto (as Appendix C) an index and brief statistical analysis of the stenographic transcript of the trial. This analysis confirms that the great preponderance of the Government's entire case was devoted to Count One. For example, considering only the Government's *direct* case, there were 24 witnesses, of which 13 testified as to Count One exclusively. Of the 51 exhibits introduced by the Government, 30 relate to Count One, 19 relate to Counts Two, Three and Four, and 2 relate to all counts. Testimony of Government witnesses covers 182 pages of the trial transcript, of which 130 pages relate to Count One. The closing argument by the attorney for the Government fills 24 pages of the trial transcript; of these 24 pages, 17 are devoted to Count One. Thus, the Government's total direct case fills 242 pages of the trial transcript with 167 pages (69%) thereof devoted to Count One.

In instructing the jury, the trial court commented as follows concerning the extensive incompetent and

---

[3] In fact, the alleged understatement of income from the sale of the lots (in years prior to 1960) is what prompted the I.R.S. agent to recommend prosecution in this case in the first place (R-Vol. VII, 45). [This citation is to the Transcript of Record as certified by the Court of Appeals, volume and page. For convenience, all references to the trial record will be in this form].

improper evidence that had been received concerning income in years prior to the year of indictment:

> "Count 1 is the count where he is charged, and there is evidence, in fact, through his attorney, for practical purposes, he has admitted that there is a considerable amount of taxes due to the United States; that he didn't report his taxes correctly, and that he failed to state his income, understated his income, for quite a substantial amount of money, and *I am referring, mainly, to the income received from the sale of subdivision lots and condemnation proceedings . . .*" (R-Vol. IX, 11-12) (Emphasis added).

This petition addresses itself to the prejudicial impact upon the entire case of the foregoing extensive incompetent and improper evidence adduced before the jury and commented upon, as indicated above, by the trial court.

Further, this petition seeks review of hereinafter specified jury instructions, the validity of which are the subject of pronounced conflicts among Circuit Courts of Appeals.

REASONS FOR GRANTING THE WRIT

Grant of the writ here sought is essential to review and resolve basic conflicts among Circuit Courts of Appeals on fundamental questions of Constitutional proportions affecting the administration of justice in Federal courts. Specifically involved are conflicts among circuits related to (I) the validity of jury instructions in Federal criminal cases tending to shift the burden of proof to the defendant and establishing a fallacious criterion for the ascertainment of specific

intent; and (II) whether, in a multiple count indictment, the Sixth Amendment right of a defendant to a trial before an impartial jury is offended by the receipt in evidence of voluminous improper and gravely prejudicial evidence, taken with grossly improper instructions based on such prejudicial evidence, under one count of the indictment.

I

A Pronounced and Recurring Conflict Obtains Among Courts of Appeals in Assessing the Validity of Certain Instructions, Given at Wilkins' Trial in the Primary Charge and Repeated in Supplemental Instructions, Bearing Upon Intent and Burden of Proof

In its initial instructions to the jury, the trial court, after properly charging that proof of specific intent beyond a reasonable doubt was required in the instant case, thereupon instructed as follows:

> "As a general rule, it is reasonable to infer that a person ordinarily intends all of the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the evidence in the case leads the jury to a different or a contrary conclusion, the jury may draw the inference and find that the accused intended all the natural and probable consequences, which one, standing in like circumstances and possessing like knowledge, should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused." (R.-Vol. VIII, 165).

After the jury had retired to consider its verdict, the court received a note from the foreman asking that it define again "willful intent to defraud" and give the terminology of the "second, third, and fourth indict-

ments" (R.-Vol. VII, 4). Thereupon, the court repeated in aggravated terms the foregoing instruction, in the particular context of the jury's confusion as to what constituted "willful intent to defraud", saying:

> "As a general rule, it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the evidence in the case leads the jury to a different or contrary conclusion, the jury may draw the inference and find that the accused intended all the natural and probable consequences which one, standing in like circumstances and possessing like knowledge, should reasonably have expected to result from any act knowingly done or knowingly omitted, and the one that I am referring to there is like anybody else would be, it is like you members of the jury, what you would naturally do under the same identical similar circumstances." (R-Vol. IX, 15-16).

Petitioner, relying on *Mann* v. *United States,* 319 F. 2d 404 (5th Cir. 1963), *cert. denied,* 375 U.S. 986 (1964), challenged the foregoing instructions as clear error, as recognized by the Fourth Circuit (App. A, 15):

> "Defendant contends that the second sentence of this instruction, beginning with the words 'so, unless the evidence in the case . . .' tended to shift the burden of proof to defendant to come forward with evidence that he did not intend the natural and probable consequences of his acts. In addition, defendant asserts that an essential element of a violation of 26 U.S.C. § 7201 is specific intent but that the instruction deals with the average person rather than the particular defendant, Wilkins."

In *Mann, supra,* the court reversed a tax conviction by reason of an instruction[4] virtually identical with the foregoing instruction, despite a holding that there was substantial evidence to support the conviction. In doing so, the Fifth Circuit held such an instruction to be clear error. Commenting on the gravity of the error, the court said:

> "... [T]he effect of that portion of the charge was to make the jury aware of a certain factual hypothesis and to instruct them that if they believe this hypothesis, they were authorized, absent opposing evidence, to infer that Dr. Mann's intent was tax evasion. This he contends, is tantamount to an incriminating presumption which the jury, absent opposing evidence, could use as a substitute for proof. We agree."
>
> * * *
>
> "When the words 'so unless the contrary appears from the evidence' were introduced, the burden of proof was thereupon shifted from the prosecution to the defendant to prove lack of intent. If any inference from a fact or a set of facts must be overcome with opposing evidence, then the inference becomes a presumption and places the burden on the accused to overcome that presumption. Such a burden is especially harmful when a person is required to overcome a presumption as to anything

[4] The instruction in the *Mann* case was as follows (at 407):

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused."

subjective, such as intent or wilfulness, and a barrier almost impossible to hurdle results."

* * *

"Under the instruction here involved, the jury is invited to speculate as to what any other person similarly situated to Dr. Mann with like knowledge would reasonably have expected to be the consequences of the conduct under consideration as shown by the evidence. The test is whether Dr. Mann himself willfully attempted to evade or defeat the tax. . . . [the instruction] conflicted with the overriding presumption of innocence with which the accused is endowed under the law." (At 408-410).

The court in *Mann* lastly held that this charge could not be cured by reading the instruction as a whole since "[i]nstructions to the jury must be consistent and not misleading. The fact that one instruction is correct does not cure error in giving another inconsistent one." (*Id.* at 410). See, too, *Berkovitz* v. *United States,* 213 F. 2d 468 (5th Cir. 1954).

The Fifth Circuit holding in *Mann* is submitted as sound principle squarely in conflict with the Fourth Circuit holding in the instant case, a fact candidly recognized by the court itself (App. A, 15):

"It is true that in *Mann* this identical instruction was held to constitute reversible error even though no exception was made at trial."

The observation by the Fourth Circuit (App. A, 16) that the challenged instruction has been recently approved by the Ninth Circuit in *Sherwin* v. *United States,* 320 F. 2d 137 (9th Cir. 1963), *cert. denied,* 375 U.S. 964 (1964), only serves to highlight the pronounced conflict among circuits on this vital question.

A critical analysis of the *Mann* and *Sherwin* decisions compels the conclusion that under the rationale of either case the instruction here at issue—in a case requiring proof of specific intent—constituted plain error. *Sherwin* does not constitute a blanket affirmation of the type of instruction given below. In point of fact, a fair construction of the opinion in *Sherwin* suggests that the court was vitally concerned with the critical danger implicit in such an instruction but affirmed only by reason of an extraordinary if not unique *total* charge which, in its view, served to counter the prejudicial potential of the instruction complained of.

The instruction in *Sherwin* (320 F. 2d at 148) was virtually identical to that in *Mann* and that given by the trial court in the instant case. It must be noted, however, that the court in *Sherwin* dwelt at extraordinary length on the assertedly protective nature of the total instructions, observing, *inter alia,* that:

> ". . . [the instruction complained of] came fairly early in the course of a lengthy and extended charge. [(the charge occupies 40 pages in the record and the instruction in question appeared in the twelfth page)]" (at 149).
>
> * * *
>
> "The instructions proceeded to advise the jury *again and again* as to the requirement that the Government prove beyond a reasonable doubt the willfulness and the specific intent to evade or defeat the tax." (Emphasis added)
>
> "[after intervening instructions on other matters] . . . the court *again* returned to the questions of willfulness and intent and repeatedly called the attention of the jury to the requirement of proof of specific intent to attempt to evade and defeat taxes." (Emphasis in original)

> "Our consideration of the instructions taken as a whole compels us to say that in view of this *massive repetition* of instructions with respect to the requirement of proof of willfulness [we will affirm]." (Emphasis added) (at 150)

> "Where, as here, the trial court *over and over again* correctly charged the jury as to the necessity of proving willfulness and specific intent, and that such must be proven beyond a reasonable doubt [we will affirm]." (Emphasis added) (at 151)

Thus, it is beyond question that the court in *Sherwin* affirmed only by reason of an exhaustive and extraordinary over-all charge deemed adequate by the court to vitiate the possibility that the defendant would be prejudiced by the improper "intent" instruction there—and here—in question. The over-all charge in the instant case bears not the slightest qualitative or quantitative resemblance to that described in *Sherwin;* and it is manifest that the safeguards held to exist in *Sherwin* are not present here. Thus, although petitioner does not concede the correctness of the *Sherwin* decision, it is clear that the essential and material facts upon which that decision turned do not here obtain. Thus, it is tolerably clear that given the charge in the instant case the *Sherwin* court would be compelled to reverse.

The foregoing conclusion finds additional support in the *Sherwin* court's reference (n. 23 at 150) to the case of *Forster* v. *United States,* 237 F. 2d 617 (9th Cir. 1956). In *Forster,* as here, the jury requested supplemental instructions subsequent to entering upon its deliberations. Although the type of supplemental instruction given in *Forster* was not identical to that given here, the Ninth Circuit reversed, noting that the

supplemental instruction — perhaps non-prejudicial otherwise—"... occurred at too critical a time. In the posture it entered it came into too bright a light. It did not run in a long chorus line. Here to let it stand would be to endorse the doubtful proposition that jurors disregard instructions anyway" (237 F. 2d at 621). Significantly, in the instant case, the jury, during its deliberations, specifically requested the trial court to "define again 'willful intent to defraud' "—the *sine qua non* of the entire prosecution. Thereupon, the court repeated, virtually verbatim, the "intent" instruction initially given. That the jury had focused upon and was concerned with the concept of "intent" was manifest from the fact of its inquiry. That the supplemental instruction "occurred at too critical a time" and "came into too bright a light" to be held non-prejudicial is equally manifest.

In sum, it is apparent that the Ninth Circuit would be compelled to reverse by reason of the instruction here at issue—this not in spite of but rather *consistent with* its decision in *Sherwin* and its observations in *Forster*.

The court in *Mann* noted pertinently that an instruction such as that given below "conflicted with the overriding presumption of innocence with which the accused is endowed under the law" (319 F. 2d at 409) and, in conclusion, held that:

> "... it is never permissible to leave the jury with the idea that it becomes the duty of the defendant to establish his innocence. The charge in this case may very well have had that effect, and as such, we cannot allow the conviction to stand" (319 F. 2d at 410).

It is fairly to be stated that the questioned instruction has consistently precipitated conflicts and confusion and has been a prolific source of appeals. Indeed, even where the instruction has been found not to require reversal, it has been necessary for the courts to explain away the impact of the instruction by reference to other circumstances, as in *Sherwin, supra.* Where sustained, its impact has been characterized as "clumsy and inartistic", *United States* v. *Releford,* 352 F. 2d 36 (6th Cir. 1965) *cert. denied,* 382 U.S. 984; "confusing", *United States* v. *Denton,* 336 F. 2d 785, 788 (6th Cir. 1964); a "platitude", *United States* v. *Barash,* 365 F. 2d 395, 402 (2d Cir. 1966); and the Eighth Circuit has said that it is better not to give the instruction in a case where intent is not inherent in the act itself. *Imholte* v. *United States,* 226 F. 2d 585, 591 (8th Cir. 1955).

The need for review by this Court is highlighted by the observation of the Fourth Circuit (App. A, 15-16) that "a substantially similar instruction is favorably regarded by the writer of a manual of instructions employed by many federal judges" [referring to Mathes, Jury Instructions and Forms for Federal Criminal Cases, 27 F.R.D. 39, 78 (1961)]. When an instruction fraught with conflict and confusion has found its way into a manual of instructions, doubtless referred to routinely by trial courts, the time is ripe for this Court to review and resolve the conflict. Particularly is this true where involved is the basic principle that guilt is subjective and personal to the defendant and may not be found vicariously through an inference related to the reactions of others to acts done or omitted, and that the burden of proof may not be shifted to the defendant to overcome an inference

based upon what others "standing in like circumstances and possessing like knowledge" would have done.

The pervasive quality of the error implicit in the questioned instruction is well epitomized in this case. As developed *infra,* in its supplemental instructions to the jury, the trial court erroneously stated, in commenting on *inadmissible* evidence, that Wilkins had "admitted that there is a considerable amount of taxes due the United States; that he didn't report his taxes correctly, and that he failed to state his income, understated his income, for quite a substantial amount of money . . ." Wilkins had made no such admission and, as stated, the trial court was instructing on the basis of inadmissible evidence, as found by the Fourth Circuit. When the trial court thereupon, also in its supplemental instructions, told the jury that, unless the evidence leads the jury to a different or contrary conclusion, "it is reasonable to infer that a person ordinarily *intends* all of the natural and probable consequences of acts knowingly done," it effectively by instructions established the whole of the Government's case; i.e., that Wilkins had *intentionally* understated his income. Moreover, the impact of the instruction clearly placed upon the defendant the burden of proving a different or contrary conclusion from the evidence.

The challenged instructions—permitting a *constructive* finding of specific intent—is peculiarly misplaced in a criminal tax case involving an alleged *attempt* to evade taxes. This Court has held that in such cases an affirmative act of the *defendant* apart from the understatement of income, is required from which intent and willfulness may be found. *Spies* v. *United States,*

317 U.S. 492, 497-499 (1943). As expressed in *Jones* v. *United States,* 366 U.S. 213, 221 (1961):

> "In Spies v. United States, 317 U.S. 492, 499, 63 S. Ct. 364, 368, 87 L. Ed. 418, the Court said that § 145 (b) of the 1939 Code embodied 'the gravest of offenses against the revenues,' and stated that willfulness must therefore include evil motives and want of justification in view of all the circumstances. Id. 317 U. S. at page 498, 63 S. Ct. at page 367. Willfulness 'involves a specific intent which must be proven *by independent evidence and which cannot be inferred from the mere understatement of income.*' Holland v. United States, 348 U. S. 121, 139, 75 S. Ct. 127, 137, 99 L. Ed. 150." (Emphasis added).

There is thus a clear need for a uniform rule on a fundamental question affecting the administration of justice in Federal criminal cases. In consequence thereof, the instant petition for a writ of certiorari should be granted. *Commissioner* v. *Bilder,* 369 U.S. 499 (1962).

II

The Sixth Amendment Right of Petitioner Wilkins To Be Tried by an Impartial Jury Was Offended and Abridged by the Receipt in Evidence of Voluminous Improper Prejudicial Evidence Under Count One and the Trial Court's Gravely Erroneous Instructions Thereon

The Fourth Circuit Court of Appeals has ruled that the Government's prosecutive theory under which income for the years prior to 1960 (the tax year covered by Count One of the indictment) was included in Count One was erroneous as a matter of law and that all of the extensive evidence relating to that income was inadmissible and prejudicial to the defendant. Moreover, the appeals court found that this "error was com-

pounded by the court in its charge to the jury. . . ." (App. A, 10). The court said (App. A, 11):

> "Defendant argues that the introduction of so much improper evidence, the permitted comments thereon and consideration thereof gravely prejudiced the jury against him. We find sufficient merit in this argument from which to conclude that the conviction of defendant on Count One should be set aside and a new trial on that Count should be awarded."

The Fourth Circuit, however, went on to hold (App. A, 18):

> "Defendant contends that the court's error as to the admission of evidence with respect to the offense charged in Count One was so great as to prejudice the jury in its consideration of the remaining counts. However, in view of the fact that there was substantial independent evidence to support the defendant's convictions on Counts Two, Three and Four, we think the taint attaching to the presentation of Count One was not so great as to permeate or materially affect the convictions on the remaining counts."

In consideration of the foregoing, this case presents a graphic instance where the appeals court has recognized that extensive prejudicial evidence was received and prejudicial instructions were given on Count One of the indictment. Yet the court washes out these prejudicial factors or "taint" by the expression of a naked belief, without more, that such considerations "were not so great as to permeate or materially affect the conviction on the remaining counts." The correct standard, however, is not whether judicial matter has not been shown to have affirmatively "permeated" or "materially affected" a case but rather whether, within

the range of reasonable possibility, the prejudicial evidence (and instructions), may have contributed to the conviction. *Fahy* v. *Connecticut,* 375 U.S. 85, (1963). Moreover, it must affirmatively appear that the prejudicial matter did not in fact influence the jury. *McCandless* v. *United States,* 298 U.S. 342, 347 (1936); *United States* v. *Dressler,* 112 F. 2d 972, 978 (7th Cir. 1940); *Little* v. *United States,* 73 F. 2d 861, 866 (10th Cir. 1934).

Analysis of the relevant developments at the trial, recounted *supra,* reveals that fully two-thirds of all the evidence developed by the prosecution related to Count One of the indictment. Such voluminous evidence was improper and prejudicial and should never have been before the jury.

Apart from the overwhelming volume of prejudicial evidence before the jury on Count One, the trial court in its *supplemental* instructions charged the jury as follows *with respect to the prejudicial matter:*

> "Count 1 is the count where he is charged, and there is evidence, in fact, through his attorney, for practical purposes, *he has admitted that there is a considerable amount of taxes due the United States; that he didn't report his taxes correctly, and that he failed to state his income, understated his income, for quite a substantial amount of money, and I am referring, mainly, to the income received from the sale of subdivision lots and condemnation proceedings. . . .*" (R-Vol. IX, 11-12). (Emphasis added).

Bearing in mind that the petitioner Wilkins had made no such admission as attributed to him and had pleaded "not guilty", the foregoing instruction approached, if indeed it was not in fact, a directed verdict of guilty—

predicated upon a mass of evidence which should never have been before the jury. As stated by the court in *Hardy* v. *United States,* 335 F. 2d 288, 290 (D. C. Cir. 1964):

> "... The trial judge effectively removed the factual issues from the free choice of jury decision which trial by jury requires. The judge stated as facts, rather than as testimony to be considered by the jury in deciding the facts, the whole case of the prosecution."

Based upon the improper and prejudicial evidence on Count One, taken with the trial court's gravely erroneous charge, the jury convicted Wilkins on Count One. To say that this may not have prejudiced the jury in its consideration of the remaining counts of the case is to ignore human experience. Such prejudice cannot be compartmentalized and confined to Count One alone, as the Fourth Circuit has done, simply because there may have been sufficient evidence to sustain the convictions on the remaining counts. Prejudice is not so neatly contained! Nor may the sufficiency of evidence on other counts defeat a solid claim of prejudice.

In fact, the Fourth Circuit has so recognized in *United States* v. *Johnson,* 337 F. 2d 180 (4th Cir. 1964), aff'd. 383 U.S. 169 (1966):

> *"Though we find the evidence sufficient to support a guilty verdict on all counts, the invalidity of count one as applied to Johnson was obviously prejudicial to his right to the unbiased consideration of the jury on the remaining counts.* Many of the events testified to at the trial related only to the speech. It was introduced into evidence and its authorship, contents, motivations and accuracy made the subject of extensive inquiry. *The conclusion is unavoidable that this mass of evidence*

> *and comment, all inadmissible against Johnson, infected the jury's consideration of his innocence or guilt under the conflict of interest counts.* The judgment against Johnson is therefore vacated and the case remanded for a new trial on the counts charging violations of 18 U.S.C.A. § 281." 337 F. 2d at 204. (Emphasis added).

Significantly, the court computed that some one-half of the evidence adduced at trial in *Johnson* was inadmissible; in the instant case some two-thirds of the trial evidence adduced against Wilkins was inadmissible.

In contemplation of the disparity in the Fourth Circuit decisions in *Johnson* and *Wilkins,* the holding in *Flemister* v. *United States,* 260 F. 2d 513 (5th Cir. 1958), is illuminating. In *Flemister* the defendant had been convicted of willfully and knowingly attempting to evade and defeat his income taxes in the years 1949, 1950, and 1951. The Fifth Circuit held, among other things, that the trial court erred in not granting defendant's motion for an acquittal on Count One on the ground that the year 1949 was barred by the statute of limitations. The court thereupon ordered a new trial on the remaining counts, stating:

> "Where, by a trial of the limitation issue separately it should have been determined, as we have done, that the year 1949 was barred, it might well have been prejudicial to the defendant for the jury to hear evidence of understatements of income and computations of underpayment of tax as to the barred year in addition to those which were properly before it." 260 F. 2d 518.

How much more is a comparable result impelled by the facts of the instant case where the overwhelming

majority of the evidence in the entire case was improperly received under Count One and where the trial court effectively instructed that such improper evidence established the defendant's guilt! Could any jury, having erroneously convicted the defendant on Count One, thereafter be dispassionate and impartial in its consideration of evidence related to the remaining counts?[5]

In *Smith* v. *United States,* 335 F. 2d 270 (D.C. Cir. 1964), the court observed as follows in a case wherein the evidence received under one count was found to be inadmissible:

> "The Government argues that (since the sentences on all counts are concurrent) under Hirabayashi v. United States, 320 U.S. 81, 63 S. Ct. 1375, 87 L. Ed. 1774 (1943), we may affirm the entire judgment, despite error on count one, if there is sufficiently properly admitted evidence to sustain the jury's verdict on count two or count three. But we think *Hirabayashi* allows affirmance only if the jury's consideration of counts two and three was not prejudiced by error on count one. This appears from the rule as stated by the Supreme Court in United States v. Trenton Potteries Co., 273 U.S. 392, 402, 47 S. Ct. 377, 381, 71 L. Ed. 700 (1927) . . ."

In the context of treating the question whether, in a case involving concurrent sentences, a conviction on one count may stand in the face of reversal on another count, the court in *Smith, supra,* stated:

> "*. . . we are aware of no case which invoked the rule to defeat a claim of prejudice resulting from*

[5] Significantly, the trial court suggested to the jury that it "take up Count One first and dispose of that Count, get your final vote, your final unanimous vote, before you consider the other one." (R-Vol. VIII, 173-174).

> *the seriously erroneous admission of evidence.* Most often the error alleged is insufficiency of the evidence, Lawn v. United States, 355 U.S. 339, 359, 78 S. Ct. 311, 2 L. Ed. 2d 321 (1958), or invalidity of the law, Whitfield v. Ohio, 297 U.S. 431, 56 S. Ct. 532, 80 L. Ed. 778 (1936). In neither type case would prejudice from the invalid count be likely." Footnote 2, 335 F. 2d at p. 272.

Similarly, we have found no case wherein extensive prejudicial evidence and instructions on one count has not served to vitiate a conviction on another count, thereby requiring a new trial on all counts. It is submitted that the Fourth Circuit holding in *Wilkins* represents a dangerous extension, destructive of a defendant's Sixth Amendment right to trial before an impartial jury, of the sufficiency-of-the-evidence concept to a case involving a claim of prejudice flowing from the seriously erroneous admission of voluminous evidence and improper instructions thereon. The issue is one of prejudice, not sufficiency of evidence, as clearly recognized in *Fahy* v. *Connecticut*, 375 U.S. 85:

> "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a *reasonable possibility that the evidence complained of might have contributed to the conviction.*" 375 U.S. at pp. 86-87. (Emphasis added).

At the expense of repetition, *the question here presented is not the adequacy of evidence to convict on the remaining counts but whether within the range of reasonable possibility the voluminous prejudicial evidence and instructions may have contributed to the conviction. Kotteakos* v. *United States*, 328 U.S. 750 (1946); *San Fratello* v. *United States*, 340 F. 2d 560 (5th Cir.

1965), rehearing denied 343 F. 2d 711; *Oliver* v. *United States,* 335 F. 2d 724, 728 (D.C. Cir. 1964); cert. denied sub nom. *Crump* v. *United States,* 379 U.S. 980 (1965).

The prejudice to Wilkins under Counts Two, Three, and Four as a result of the presentation of inadmissible evidence under Count One is not unlike the prejudice to the defendants in *Kotteakos* v. *United States, supra,* which resulted from the joinder in one trial of charges against a number of unrelated defendants. The Supreme Court said:

> ". . . the question is, not were they [the jury] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. (Citations omitted).
>
> "This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. . . .
>
> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. (Citation omitted). *But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result;*

apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." 328 U.S. at 764-765, 66 S. Ct. at 1247-1248. [Emphasis supplied].

In assessing whether the prejudicial effect of the improper evidence received under Count One may have prejudiced the jury in its independent consideration of the remaining counts, it is germane to note the fundamental relative *weakness* of the Government's evidence on such remaining counts. The relative strength of the evidence against the defendant is a material factor in weighing whether trial errors require reversal. *Jones* v. *United States,* 338 F. 2d 553, 554, n. 3 (D.C. Cir. 1964).

The sole ultimate issue common to Counts Two, Three, and Four of the Wilkins indictment was whether he had an agreement with the lessee of his property that payments received for the first three years (covering the three counts) of the lease period were for the purchase of Wilkins' home located on the property and hence not taxable income. As found by the Court of Appeals, three witnesses who participated in the negotiations for the property testified as to the existence of such an agreement. Two other witnesses gave corroborating testimony;[6] and documentary evidence concerning the agreement was presented.[7] In an ultimate sense, the only probative evidence countering this preponderant evidence was a written confirmatory agreement prepared by Wilkins, and signed by the lessee,

[6] Defendant's Exhibit No. 10; R-Vol. VIII, 55-57.

[7] Defendant's Exhibit No. 2; R-Vol. VI, 30.

long after the tax returns had been filed. The confirmatory agreement was predated, however, as of the date of the original transaction and was permitted to serve as basis for an inference by the jury that the confirmatory agreement was therefore fabricated. The overwhelming weight of the evidence thus supported the defense on Counts Two, Three, and Four. Can it be reasonably said that a jury, charged with finding guilt beyond a reasonable doubt, would have rejected the overwhelming weight of the evidence concerning the existence of an agreement to purchase the Wilkins' home if not influenced by its finding that Wilkins—on the basis of inadmissible evidence and grossly improper instructions—had sought to evade taxes under Count One? It is significant that the court in *Smith* v. *United States, supra,* observed that improper evidence received under one count could only be deemed "harmless" where the prosecutive evidence on the remaining counts was "overwhelming". Here, however, the contrary exists.

Wilkins in his pre-trial motions moved to dismiss Count One on the very ground on which this Court has reversed his conviction thereon, and also moved to have that evidence excluded from the trial, but the trial court ruled against him. In addition, Wilkins moved for a severance of Count One on the ground that the pre-1960 evidence would be prejudicial to him on the other counts, but this motion was also denied. The Fourth Circuit has in effect ruled that the trial court was in error in denying the defense motions to exclude this evidence from the trial. Had the trial judge himself reached that conclusion prior to submitting the case to the jury the amount of inadmissible evidence already introduced would almost certainly have com-

pelled him to declare a mistrial. At the very least the situation would have required the trial judge to give strong and definite instructions to the jury to disregard this evidence. As the court in *United States* v. *Simone*, 205 F. 2d 480, 483 (2d Cir. 1953), stated:

> "It is the general rule that error in admitting evidence may be cured by instructing the jury to disregard it; but where the character of the evidence is such that the jurymen are unlikely to be able to blot it from their minds despite the court's later instruction to do so, a mistrial should be granted."

Here there were no instructions to disregard the improper evidence. Indeed, the instructions with regard to Count One were such as to prejudice Wilkins on all counts, as discussed above. If it is impossible for a jury to eradicate substantial prejudicial evidence from its thinking when it has been instructed to do so, how can the Court say that here, where the jury was not so instructed, it was uninfluenced by the inadmissible evidence in reaching its verdict on Counts Two, Three, and Four? Is not the necessity for a new trial upon the whole of the case even more pronounced upon appellate review where the jury has convicted a defendant as a tax evader upon the prejudicial evidence and instructions and thereupon proceeds to consider evidence as to other counts?

Where voluminous prejudicial evidence, aggravated by seriously erroneous instructions, goes before a jury, as here, a new trial is required for the elementary reason that the court cannot be certain what influenced the minds of the jurors in reaching a verdict. Otherwise expressed in another connection, the court in

Braswell v. *United States,* 200 F. 2d 597, 602 (5th Cir. 1952), stated:

> "The right to trial by jury comprehends a fair determination of the guilt or innocence of the accused, free from bias, passion or prejudice. See United States v. Haupt, 7 Cir., 136 F. 2d 661. And where error occurs which, within the range of a reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. See Little v. United States, 10 Cir., 73 F. 2d 861, 866, 96 A.L.R. 889; Cf. Kotteakos v. United States, 328 U.S. 750, 763-765, 66 S. Ct. 1239, 90 L. Ed. 1557."

The Supreme Court is urged to review the instant case to forestall a dangerous precedent tending inexorably to undermine a defendant's right under the Sixth Amendment to be tried before an impartial jury.

CONCLUSION

For the reasons hereinbefore stated, this petition should be granted in contemplation of conflicting decisions among courts of appeals to the end that uniform standards shall obtain in Federal criminal cases upon fundamental questions related to specific intent, burden of proof, and the impact of extensive prejudicial evidence upon a defendant's right under the Sixth Amendment to be tried before an impartial jury.

Respectfully submitted,

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